Supreme Court, U.S.
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No. 79-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ESTATE OF MICHAEL CARGILL,
RUSSELL CARGILL, ADMINISTRATOR,
Appellant,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
Appellee.

JOHN MICHAEL MULCAHY,
By His Father and Next Friend, and
JOHN J. MULCAHY, Individually,
Appellant,

v.

CITY OF ROCHESTER, NEW HAMPSHIRE,
Appellee.

On Appeal from a Judgment of the Supreme Court of the State of New Hampshire

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MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 16(1)(b), the appellee City of Rochester moves to dismiss this appeal on the ground

that it raises no substantial federal question and that, in any event, the lower court's resolution of the issues under federal law was plainly correct.

STATEMENT

In 1974 the Supreme Court of New Hampshire declared that the State's municipalities should no longer be completely immune from tort liability.[1] *Merrill* v. *City of Manchester*, 114 N.H. 722, 332 A.2d 378 (1974). Prior to *Merrill*, sovereign immunity generally was "deeply entrenched" in New Hampshire's jurisprudence.[2] Immunity for the State's cities and towns dated back to at least 1821,[3] and as recently as 1966 the State's Supreme Court had expressly refused to abolish it, observing that to do so would "thrust upon them a potentially catastrophic financial burden." *Gossler* v. *City of Manchester*, 107 N.H. 310, 221 A.2d 242, 245 (1966).

Recognizing the potentially drastic impact of its decision in *Merrill*, the New Hampshire Supreme Court delayed its effective date some seven months "[t]o permit the legislature to take action in regard to the [resulting] social and economic factors," and to permit the affected cities and towns time to make the necessary financial

[1] "We hold that the immunity from tort liability heretofore judicially conferred upon cities and towns is hereby abrogated except for the following exception. They are immune from liability for acts and omissions constituting (a) the exercise of a legislative or judicial function, and (b) the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Merrill* v. *City of Manchester*, 114 N.H. 722, 332 A. 2d 378, 383 (1974).

[2] *Krzysztalowski* v. *Fortin*, 108 N.H. 187, 230 A.2d 750, 751 (1967): "[T]he solid fact [is] that neither the Legislature nor this court is committed to the abrogation of governmental immunity for torts." *Id.*, at 752.

[3] *Farnum* v. *Town of Concord*, 2 N.H. 392 (1821).

arrangements. 221 A.2d at 384. In so doing, it expressly acknowledged the continuing authority of the legislature "to specify the terms and conditions of suit against the cities and towns, limit the amount of recovery, [and] take any other action which in its wisdom it may deem proper." *Id.*

Thereafter, the New Hampshire legislature enacted the statute here under attack. Entitled "Bodily Injury Action Against Governmental Units," the provision allows certain "governmental units," including cities and towns but not including the State or its departments and agencies,[4] to be sued for negligently inflicted "bodily injury." The amount recoverable is limited to $50,000. New Hampshire RSA, Chapter 507-B (Supp. 1977). The foregoing act became effective on July 1, 1975, the effective date established by the Supreme Court in *Merrill*. The exposure of New Hampshire's cities and towns to tort liability thus *began* with a monetary limit on the amount recoverable.[5]

[4] The *Merrill* decision did not affect the immunity of the State. 332 A.2d at 384. Since 1951 the State legislature had permitted suits against the State for breach of contract with no limits on liability. RSA 491:8. Attempts to extend the coverage of this statute to torts had failed, however. *Krzysztalowski* v. *Fortin*, *supra*. Effective July 1, 1977, the New Hampshire legislature established an expanded procedure for making claims against the state. RSA 541-B:1, *et seq.* (Supp. 1977). At present, liability for torts committed by the state is, like that for cities and towns, limited to $50,000. *Id.*

[5] Prior to *Merrill*, New Hampshire's municipalities had apparently sometimes been held liable for torts committed in the course of the performance of their "proprietary" activities. *See Merrill* v. *City of Manchester*, *supra*, 332 A.2d at 381, and cases there cited. Appellants, however, make no contention that their injuries would have been fully recoverable prior to the enactment of RSA 507-B on the theory that the city's activities in this case were "proprietary." Indeed, it would appear that New Hampshire law on this point is settled against them. *Harkinson* v. *City of Manchester*, 90 N.H. 554 5 A.2d 721 (1939); *Allen* v. *Manchester*, 99 N.H. 388, 111 A. 2d 817 (1955).

The accident which gave rise to this appeal occurred on August 6, 1976 at a Municipal pool operated by the City of Rochester. It resulted in the death of one boy and the serious injury to another. The accident was allegedly the result of negligence on the part of employees or agents of the City of Rochester. Litigation was commenced in November of the same year, with both Appellants claiming damages substantially in excess of the statutory limit. Thereafter, both Appellants initiated separate declaratory judgment actions contending that the statutory limitation on liability was unconstitutional.[6]

The only federal claim advanced by the Appellants in their Petitions for Declaratory Judgment and in their brief to the New Hampshire Supreme Court was that the liability limitation denied them the equal protection of the law secured by the Fourteenth Amendment to the U.S. Constitution (Jurisdictional Statement, pp. 3-4). At oral argument, Appellants for the first time advanced the argument that their federal rights under the Due Process Clause were also violated by the statute. *Id.* The State court upheld the constitutionality of RSA 507-B, and this appeal followed.

QUESTION PRESENTED

Whether the Fourteenth Amendment inhibits the States in defining and limiting the tort liability of their political subdivisions.

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[6] The judgment here appealed simply holds the state statute constitutional. Though this judgment is of considerable practical value to the parties as an incentive to settlement, and its interlocutory nature is presumably consistent with State procedural rules, the fact remains that neither the City's liability nor the Appellants' damages have yet been adjudicated. Under these circumstances there is a serious question whether this is a "final judgment" under the principles announced in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

ARGUMENT

I. LONG ESTABLISHED FEDERAL JURISPRUDENCE PROTECTS THE RIGHT OF THE STATES AND THEIR SUBDIVISIONS TO DEFINE AND LIMIT THEIR SUSCEPTIBILITY TO SUIT.

Appellants' contentions that the Fourteenth Amendment may be used to expand the exposure of the States or their political subdivisions to tort liability runs in the teeth of long-settled principles of federal jurisprudence. Whether and under what conditions a state or its political subdivisions may be sued has consistently been recognized by this Court as a matter peculiarly for the States themselves to decide, and not a matter to be decided through construction of the Due Process and Equal Protection Clauses of the federal Constitution. "The right of individuals to sue a state, in either a Federal or a state court, cannot be derived from the constitution or laws of the United States. It can come only from the consent of the state." *Palmer* v. *Ohio*, 248 U.S. 32, 34 (1918). Moreover, once granted, the consent of the state may be later withdrawn or qualified without constitutional inhibition. *Beers* v. *State of Arkansas*, 61 U.S. 527, 20 How. 527 (1858).[7]

Quite contrary to the contentions necessarily advanced by the Appellants, federal concern for State immunity

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[7] As the Court said in *Beers*:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is all together voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Id.*

from suit dates from the beginning of the Republic. This Court's conclusion in 1793 [8] that the States could be sued in federal court resulted, five years later, in passage of the Eleventh Amendment forbidding such suits as a matter of constitutional law. *See, Edelman* v. *Jordan,* 415 U.S. 615, 662 (1974); Prosser, *Law of Torts* 975 (4th Ed. 1971). This Court has always been mindful of the protections extended to the States and their treasuries by the Eleventh Amendment. *See, e.g., Edelman* v. *Jordan, supra*; *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459 (1945); *Hans* v. *Louisiana,* 134 U.S. 1 (1890); *Duhne* v. *New Jersey,* 251 U.S. 311 (1920). It has also stressed that there are "limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." *National League of Cities* v. *Usery,* 426 U.S. 833, 842 (1976).

In short, to the extent there is a federal interest in the exposure of a State or municipality to tort liability, it runs against the Appellants' contentions. We do not, of course, contend that State and municipal immunity from tort liability is affirmatively protected by the federal Constitution. But long-established federal precedent protects the right of the States and their political subdivisions to determine the extent, if any, of their liability to suit. *See Krause* v. *State,* 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972), appeal dismissed, 409 U.S. 1052, rehearing denied, 410 U.S. 918; *Crowder* v. *Department of State Parks,* 228 Ga. 436, 185 S.E. 2d 908, appeal dismissed, 406 U.S. 914 (1972); *Brown* v. *Wichita State University,* 217 Kan. 279, 540 P. 2d 66, appeal dismissed, 429 U.S. 806 (1976); *Perry* v. *Kalamazoo State Hospital,* 404 Mich. 205, 273 N.W. 2d 421, appeal dismissed, —— U.S. ——, 48 U.S.L.W. 3186 (Oct. 1, 1979).

Two cases decided just this Term confirm the foregoing proposition in unmistakeable terms. In *Martinez* v. *Cali-*

[8] *Chisholm* v. *Georgia,* 2 Dall 419, 1L Ed 440.

fornia, —— U.S. ——, 48 U.S.L.W. 4076 (Jan. 15, 1980), a case involving a suit by the estate of a woman raped and murdered by a parolee, the Court upheld a California statute granting absolute immunity to public employees who make parole determinations. The court spoke in terms directly responsive to the arguments here advanced by the Appellants:

> Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. *But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.* 48 U.S.L.W. at 4077. (Emphasis supplied.)

The Court thus recognized that the rules of tort law themselves, whoever is the defendant, is a matter of state law largely unaffected by constitutional considerations.

In *Ferri* v. *Ackerman,* —— U.S. ——, 48 U.S.L.W. 4054 (Dec. 4, 1979) the Court reversed a decision of the Pennsylvania Supreme Court holding that lawyers appointed to represent indigent defendants under the federal Criminal Justice Act were immune under that Act from malpractice suits. The state court holding presented the question "whether federal law in any way pre-empts the freedom of a State to decide the question of immunity . . . in accord with its own law." 48 U.S.L.W. at 4055. In deciding that the Criminal Justice Act did not so limit the State, the Court stressed that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity . . ." *Id.*

II. THE NEW HAMPSHIRE STATUTE HERE UNDER ATTACK DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants claim that the statutory limit on liability denies them a constitutionally protected right to full recovery for their injuries. Relying on some inferences drawn from this Court's decisions in *New York Central R.R. Co.* v. *White*, 243 U.S. 188 (1916) and *Duke Power Company* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), Appellants contend that the Due Process Clause prohibits a state from eliminating a common law right without replacing it with an adequate substitute. As we have shown, these contentions run against the long-established right of the States to determine for themselves the extent to which they and their subdivisions may be sued. They also fail under conventional Due Process analysis.[9]

In the first place, Appellants' arguments depend upon their claim that prior to the passage of RSA 501-B, they had a common law right to recover damages from the City of Rochester for negligently inflicted injuries. The reverse is true. As the *Merrill* case makes clear, Appellants would have had no rights whatsoever to recover against the City prior to that decision. The New Hampshire legislature took away no rights when it enacted RSA 507-B in response to the *Merrill* decision. Rather it created and defined for the first time the right to recover

[9] Though Appellants' Jurisdictional Statement concentrates on their Due Process Arguments, these contentions were not briefed before the New Hampshire Supreme Court. It appears, moreover, that the State court did not pass on the federal Due Process claim, though it did not expressly refuse to do so. (Jurisdictional Statement, pp. 24-25.) It is clear that the dissenting judge below relied entirely on state grounds. (*Id.* at 26-27.) There is, therefore, a serious question whether or not the Due Process issue is properly before this Court. *See Silver* v. *Silver*, 280 U.S. 117 (1929); *Street* v. *New York*, 394 U.S. 576, 582 (1969).

damages for bodily injuries attributable to the state's cities and towns.[10]

More fundamentally, Appellants appear to misapprehend the nature of the rights protected by the Due Process Clause. Generally speaking the Due Process Clause does not extend its protections to "potential" or inchoate rights. *See Keller* v. *Dravo Corp.*, 441 F. 2d 1239, 1242 (5th Cir. 1971). Rather, it protects "*interests that a person has already acquired in specific benefits.*" *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972). Had the Appellants been injured at a time when the state's laws entitled them to full recovery, and had the legislature thereafter enacted legislation limiting their right to recovery, a more difficult question might have been presented. But that is a not this case.

Appellants seem to advance the long-discredited notion that an individual has a constitutionally protected interest in the legal *status quo*. But "[a] person has no property, no vested interest in any rule of the common law . . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature . . ." *Munn* v. *Illinois*, 94 U.S. 113, 134 (1876).[11] And this Court's "cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets other-

[10] See note 5, *supra*.

[11] In upholding a state guest statute, sharply limiting the right of an automobile passenger to recover damages arising out of the negligence of his host driver, the Court spoke of the "rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver* v. *Silver*, 280 U.S. 117 (1929). *Cf. Carr* v. *United States*, 422 F. 2d 1007, 1010 (4th Cir. 1970); *Clarke* v. *Storchak*, 384 Ill. 564, 52 N.E. 2d 229 (1943), appeal dismissed, 322 U.S. 713 (1944).

wise settled expectations." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

Appellants' reliance on *New York Central* v. *White*, *supra*, is misplaced. In that case this Court upheld New York State's newly enacted workers' compensation law in the face of a variety of constitutional objections advanced by employers. In doing so the Court repeatedly stressed the notion that settled "rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the state." 243 U.S. at 199. The Court's speculation, relied on by Appellants, that a state might not be entirely free to "suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute," was made in contemplation of New York's "vast industrial organization," set up "in reliance upon the probable permanence of an established body of law governing" the relationships involved—especially the employer-employee relationship. Those factual concerns have no relevance in this context; and the Court's dictum in *White* cannot, accordingly, serve to breathe life into this controversy.

Moreover, even if the Court's speculation in *White* were factually opposite, it was made at a time when the Due Process Clause was regularly employed to strike down state and federal legislation on substantive grounds. That time is long past. *See Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).[12] "It is by now well established that legislative

[12] In the words of Justice Holmes, approved by the Court in *Ferguson* v. *Skrupa*, 372 U.S. at 729:

> [A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the . . . Court may happen to entertain.

Tyson & Brother—United Theatre Ticket Officers v. *Banton*, 273 U.S. 418, 445 (1927) (dissenting opinion).

acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 15.

Appellants' reliance on this Court's relatively recent decision in *Duke Power Company* v. *Carolina Environmental Study Group*, *supra*, is even more tenuous. Under attack in that case was the Price Anderson Act, an act of *Congress* which effectively abrogated state laws of tort liability in all instances involving potential claims against *private* nuclear power companies. Enacted as a device to encourage the private development of nuclear power, the Act established a claims procedure and an aggregate limit on monetary liability. After disposing of very difficult issues of jurisdiction and standing, the Court faced an issue very different from that presented in this appeal: the extent of *Congress'* power to drastically tamper with state law remedies against an important and potentially dangerous segment of private industry.

This Court upheld the Price Anderson Act as a valid exercise of Congress' power to enact economic legislation. It also rejected the contention that the Act failed to provide a "satisfactory quid pro quo for the common-law rights of recovery which the Act abrogates." 438 U.S. at 88. In doing so, however, the Court expressed considerable skepticism that the "Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.*, and see n. 32. Appellants stress this language in their Jurisdictional Statement, arguing that it confirms the presence here of substantial and unresolved federal questions. But the Court's language more readily supports the opposite conclusion.

III. THE NEW HAMPSHIRE STATUTE HERE UNDER ATTACK DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants' contentions that the limit on liability denies them Equal Protection are equally insubstantial and without merit. In their Jurisdictional Statement Appellants argue that by failing to impose a limit on the cities' liability for property damage the legislature has invidiously discriminated against those plaintiffs who suffer severe bodily injury. They also argued below that the resulting discrimination between those plaintiffs who are injured by the cities and towns and those who are injured by private tortfeasors denies Equal Protection. Both claims are clearly without substance.

The Court below was plainly correct in holding that the legislation in question touched no "fundamental right" within the context of Equal Protection analysis. Unless the legislation in question touches on one of the traditional "suspect" categories, *See, e.g., McLaughlin* v. *Florida*, 379 U.S. 184, or directly infringes a constitutional right, *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972), the classifications it creates need only be rationally related to a lawful state objective. This proposition was reiterated by the Court just last Term in *Parham* v. *Hughes*, —— U.S. ——, 47 U.S.L.W. 4457 (April 24, 1979)

> State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. 47 U.S.L.W. at 4458. (Citations omitted.)

Put more pungently, "[m]isguided laws may nonetheless be constitutional." *James* v. *Strange*, 407 U.S. 128, 133 (1972).[13]

The law in question plainly bears a "rational relationship to a permissible state objective." The State has a clear interest in balancing the well-being of its individual citizens against the financial stability of its cities and towns. This legislation constitutes a reasonable attempt to strike a part of that balance. Other states might do it differently, but there is nothing in the Fourteenth Amendment which requires a different approach.

CONCLUSION

For the foregoing reasons, appellee City of Rochester respectfully submits that the appeal should be dismissed.

Respectfully submitted,

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[13] *See also McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961):

> "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objectives. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.